



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A.)

CRIMINAL APPEAL NO. 103 OF 2013

BETWEEN

PATRICK NGUNJIRI KARIUKI..... 1ST APPELLANT

STEPHEN KAGUONDU KAHURE..... 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri

(Sergon & Wakiaga, JJ.) dated 19th June, 2013

in

H.C.CR.A No. 276 of 2008)

JUDGMENT OF THE COURT

This is a second appeal by Patrick Ngunjiri Kariuki and Stephen Kaguongo Kahure (*1st and 2nd appellants respectively*) from the judgment of the High Court (*Sergon & Wakiaga, JJ.*) dated the 9th December, 2011. Both appellants were charged together with 5 other accused persons with two counts of robbery with violence contrary to **Section 296 (2)** of the **Penal Code** and several other offences before the Chief Magistrate's Court at Nyeri. After trial the 5 co-accused persons were acquitted of all the charges but the two appellants herein were found guilty, convicted and sentenced to suffer death in respect of the two charges of robbery with violence. The appellants unsuccessfully appealed before the High Court, thus this appeal.

For sake of clarity these are the particulars of the offences that the appellants were convicted of; the first count stated that on the 11th day of February, 2006 at Kayaba Village, Karatina in Nyeri District within Central Province, the appellants with others, being armed with dangerous weapons namely pistols robbed Peter Kamwaro Gachunji of a Motor Vehicle Registration Number KAQ 483 C Toyota Station Wagon, Cash Ksh 20,000/=, TV set make Sony, one Video machine make Sony, one DVD make Samsung, one Radio Cassette make Panasonic, two electrical iron boxes, one electrical kettle, assorted kitchen utensils, assorted beddings, assorted clothing, assorted seat covers, three mobile phones make Nokia 2100, Nokia

2100 and Samsung RX 220, one floor carpet, one bicycle make Montana all valued at Ksh 1, 026, 000/= the property of Peter Kamwaro and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said Peter Kamwaro Gachunji.

The particulars of the second count were that on the 11th day of February, 2006, at Kayaba Village, Karatina in Nyeri District within Central Province, the appellants with others being armed with dangerous weapons namely Pistols, robbed Jeniffer Wanjiru Githinji of Ksh 80,000/= the property of Jeniffer Wanjiru Githinji and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said Jeniffer Wanjiru Githinji.

The prosecution relied on the evidence of 10 witnesses who gave an account of how the robbery occurred and to some extent, how the appellants were arrested and linked up with the offence of robbery with violence which occurred on the night of 11th day of February, 2006. On the said night, at about 8 pm at Kayaba village in Karatina, Peter Kamwaro, (PW1), his wife Jenifer Wanjiru Githinji, (PW2) and their house maid Emily Njeri (PW3) were terrorized by a gang of robbers. PW1 had just driven to his home in his motor vehicle registration No KAQ 433C Toyota Station Wagon. On reaching his compound, he alighted, opened the gate and drove the car inside. As he returned to close the gate, three men accosted him, each of them pointing a pistol at him. The assailants forced their way into the compound and demanded for money from PW1, at the same time ordering him to sit at the back of his motor vehicle.

PW1 testified before the trial court that although he had not given the description of the assailants to the police when he made the report, he had noted the essential features of how two of the assailants looked like. He said one of the assailants was short in stature, and the other was tall. It was the tall one who entered PW1's car and sat on the driver's seat while the other two sat on the passenger seat and the back seat respectively. PW1 handed to the assailants a sum of Ksh. 20,000/= while in the car but they demanded for more money. Moments later, the thugs took his mobile phone but they removed the sim card. PW1 stated that he was with the thugs for a considerable period of time because during the ordeal the car alarm went off twice and they ordered him to switch it off.

The assailants escorted PW1 to his house at gun point. Upon reaching the door, he knocked and his wife, Jennifer Wanjiru Githinji (Jennifer) - PW2 opened for them. According to PW1, PW2 and PW3, the electric lights remained on at the veranda and also inside the house as the assailants carried out the orgy of stealing their household effects. Upon gaining entry into the house, the three assailants ordered PW1, PW2 and PW3 to lie down on the floor. When the three witnesses were lying down they could not see the assailants as they were ordered not to look up. However PW1 and PW3 each said they were able to clearly see the features of the short assailant (1st appellant) whom PW1 described as a young man, short, slim and having a long face. He said he saw the tall assailant entering another room while a short one went where the television was and carried it out. PW3 also said she saw the 1st appellant as the one who removed the T.V from the dining room.

PW 2 was ordered to follow the tall assailant (2nd appellant) to another room where he demanded money from her. In the meantime, two other members of the gang remained behind ransacking the house. Suddenly, the tall assailant who had left with PW2 returned to the living room with her, and he ordered PW1 to lie down and stepped on his neck pinning him to the ground. This assailant then forced PW1 to follow him to the bedroom while demanding for more money. PW1, gave out a further sum of Ksh 80,000/= in cash which was in an envelope in his bedroom. Satisfied with the turn of events, the tall assailant led PW1 back to the living room where his wife and the house help were still lying on the floor. Meanwhile the other two assailants were busy carting away household items from the house.

The tall assailant then moved towards PW1's motor vehicle thereby triggering the alarm the second time and PW1 was ordered to switch it off. Thereafter, the gang tied PW1; his wife on their hands and covered them with a blanket. They told PW1 that he would find his vehicle at Mukurwe-ini. The assailants then left the scene with the vehicle and several household goods. After the thugs left, PW1 managed to untie himself and his wife, he went to the bedroom and untied the house help, and opened for the children who were locked in separate rooms. The whole family escaped through the kitchen door and sought help from

a neighbor about 50 meters away. They were assisted with a telephone that they used to inform a friend who in turn informed police at Kiamachimbi police post. The police visited the scene the same night. The following day PW1 was notified by the police that his vehicle was recovered in Nyeri.

After about 4 months, PW1 was called by the police and informed that some of his household items were recovered at King'ong'o area, he identified several household items that were stolen on the material night. An identification parade was conducted at Nyeri police station by Inspector Amon Siaji on the 28th July, 2006. PW 1 was able to identify the 1st appellant as one of the members of the gang of robbers that robbed them on the material night as there was sufficient light on being picked at the parade, the 1st appellant protested that PW1 was able to identify him from the photographs shown to him by the police, an allegation the parade officer said he disregarded as the suspect could not substantiate which police officer had given out his photographs.

The evidence of PW2 and that of PW3 corroborated that of PW 1 in all its material aspects of how the robbery occurred. PW2 stated that although she did not attend the identification parade, she was able to identify the 2nd appellant as one of the robbers who entered their house on the material night; that the 2nd appellant had a gun which he used to threaten her to lie down; that the 2nd appellant also robbed PW2 the sum of Ksh 80,000/= at gun point and that he was tall. The 2nd appellant also features prominently in PW3's testimony as the person who ordered her to lie down. PW3 stated that she was able to see the 1st appellant when he disconnected the TV from the mains supply and described him as short and brown. This was a description that tallied with the one given by PW1. The electricity lights were on throughout the ordeal. PW3 had a further encounter with the 2nd appellant when he led her at gun point to another room and demanded money, whereupon she gave him the sum of Ksh 1,500/= this is what PW3 said in her own words ***"I saw accused 3 (the second appellant) face to face inside the room"***.

The injuries suffered by PW1 during the robbery were certified by Maina Ndirangu PW4, a clinical officer, who treated him at Karatina District Hospital. The 1st appellant was arrested first as it appears from the evidence that it was him who led the police to the arrest of the 2nd appellant. It is however not clear from the evidence how the 1st appellant was arrested. The 2nd appellant's house was searched and two items namely a T.V and a bedcover that were identified by the complainants were found in his house at Kangarithi in Nyeri.

Based on the foregoing summary of evidence the trial court found the appellants had a case to answer, and upon being put on their respective defence, they each gave a sworn statement of defence. Each denied having committed the offence. The 1st appellant denied that on the material day he was anywhere near the scene of crime. He stated that he was in Mombasa at the material time and denied any knowledge of the persons he was charged with. He claimed that he was arrested along Kamakwa - Tetu road on the 18th July 2006, after which he was taken to Nyeri police station and later at Othaya. Similarly the 2nd appellant gave an alibi of the day the robbery occurred. He claimed that he was arrested on 19th July 2006, in his house at Kamakwa and the police impounded his own T.V which he claimed that he had bought in Loitoktok in the year 2005 and was given a receipt which he produced. He denied that he was found with a bedcover that was identified by the complainants.

The leaned trial magistrate was convinced the prosecution had proved their case, he found the appellants' defence lacking in credibility and convicted the appellants of the two counts of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. They were both sentenced to suffer death in respect of the 1st count while the sentence in the second count was held in abeyance. The appellants' appeal before the High Court was dismissed, hence this appeal. We will summarize the grounds of appeal in order to avoid repetition and proliferation of mistakes.

The leaned Judges of the High Court were faulted for;

- ***Relying on evidence of identification without taking due consideration of the prevailing circumstances that were not conducive for positive identification.***

- *Failure as the 1st appellate court to critically analyze the defence case as against the prosecution's case to the detriment of the appellants.*
- *Failing to re- evaluate the evidence and to find it did not prove the case against the appellants to the required standard that resulted in an erroneous judgment*
- *Misapprehending the evidence by concluding the robbery took over six hours which was not borne by the evidence*
- *Failure to consider there was no description of the assailants given to the police in the first report*
- *Failure to note the identification parade was not conducted within the rules stipulated under the force standing orders, Cap 46 laws of Kenya.*
- *Failure to consider that both the arresting and the investigating officers were not called to testify hence there was lack of essential evidence with regards to investigation.*
- *Failure to observe that the complainants failed to prove ownership of items stolen.*

The above grounds were canvassed before us by Mr. Maragia, learned counsel for the 1st appellant and Mr. Muchiri, learned counsel for the 2nd appellant. Counsel for the 1st appellant submitted that the conviction of the 1st appellant was based on evidence of identification during a parade in which PW1 was able to identify the 1st appellant despite the fact that no prior description of the appellant was given to the police. The two courts below were also faulted for agreeing with the conclusions of the trial court and for making an erroneous conclusion that the robbery took 4 hours which was not borne out of evidence. The learned Judges concluded that the robbery took place for a long time between 8pm to midnight which was not found in evidence. The two courts below also ignored the state of the complainants who were subjected to intense pressure during the robbery, and in the circumstances there was a possibility of a mistaken identity. Counsel also contended that the victims of the robbery were made to lie down thereby diminishing chances of proper identification; moreover the victims were not at one place as they were moved from one room to another as the robbery went on.

Counsel made reference to the cases of *Wamunga v R- Kisumu, Cr Appeal No. 20 of 1982*, *Stephen Ndung'u Maina v Republic, -Nairobi Criminal Appeal No 147 of 2005 (Unreported)* to emphasize the principle that identification parade should always be preceded by a description of the suspect given to the police, and that dock identification without more is of no evidential value to the prosecution's case. Finally, Mr. Maragia referred us to **Section 361 of the Criminal Procedure Code** - and contended that the High Court did not re-evaluate the evidence in its entirety; had it done so, it would have realized that the robbery did not take place between 8pm to midnight; that the 1st appellant's defence of alibi was not disproved by the prosecution.

On his part, Mr. Muchiri, learned counsel for the 2nd appellant went on to poke holes on the judgment by the High Court for failing to re-evaluate the evidence as mandated but instead the Judges merely made conclusions which were devoid of credibility; whereas PW3 stated that she was able to see the 2nd appellant during the robbery, she did not give the relevant description to the police; hers was a mere dock identification which came several months after the robbery; the evidence of possession of a T.V set which was one of the items which was stolen from the complainant's house, was not supported by any evidence of ownership. Moreover the evidence of ownership was not conclusive because the complainant had reported to the police that his 24 inch T.V was among the items which had been stolen from his house, but he gave evidence of a 21 inch T.V.; the complainants also did not produce a receipt for the T.V. while the 2nd appellant claimed the T.V was his own. On the issue of a flowered bedcover, counsel was of the view that the complainants were not specific regarding the colour of the bedcover, and this being an item of common usage; it cannot form the basis of a sound conviction.

This appeal was opposed by Mr. Kaigai, the Assistant Deputy Public Prosecutor; he submitted that: there

was sufficient light at the scene of the robbery that enabled the victims to identify their assailants; that none of the attackers wore masks on the date of the robbery; the two courts below had made concurrent findings that were conclusive on the subject of light; therefore the conviction was safe.

This being a second appeal this court's jurisdiction is limited to matters of law only. In *David Njoroge Macharia – v- R, [2011] e KLR* it was stated that under *Section 361* of the *Criminal Procedure Code*:

“Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also Chemagong vs. Republic (1984) KLR 213)”.

The issue of identification is core to this appeal; consequently, we have to revisit the events of the night of 11th February, 2006, in resolving the mystery of whether the appellants were positively identified by PW1 and his family as the persons who violently robbed them. The trial court's record indicates that PW1 arrived at his gate at 8 p.m.; he was accosted by a gang of three armed robbers as he closed the gate, having driven his Motor Vehicle into his compound. This is what PW1 stated in his evidence:

“There were (sic) slight light at the scene. The men demanded for money and ordered me to enter the back of my Motor Vehicle No KAQ 483 C. One man was tall and two were short”...

PW1 went on to state:-

“The men escorted me to my house at gun point. I knocked the door and my wife opened the door. There was a bulb on at the veranda of my house. I saw one big and short man who is not in court today. The other man was tall. The other man was short”.

It is not indicated anywhere that PW1 gave the description of the assailants to the police, and even the police officers who testified confirmed that no description of the appellants was given. The police visited the scene at midnight or even subsequently as PW1 interacted with the police when he retrieved his motor vehicle and when he recorded his statement, he did not give the description of the assailants. Nonetheless, PW1 participated in an identification parade and this is what he stated:-

“An identification parade was conducted at Nyeri Police Station and I was able to pick Accused 1 (the first appellant) from his physical features namely: - brown, young man, long face, short and slim. I only identified Accused 1 (the first appellant) from the physical features”.

Under cross-examination from the 1st appellant PW1 testified as follows:-

“I only saw you once while removing the TV. I saw you for about three minutes while removing the TV. I lied (sic) down facing the TV. You removed the TV and when you turned I saw your face. I raised up my head while lying down and I saw you remove the TV. The bulb was on in the living room and there was enough light for identifying you”.

It was only PW1 who participated in the identification parade and he only identified the 1st appellant, his wife did not identify the 1st appellant at all. Going by the evidence of PW3, hers was clearly a dock identification of the 1st appellant as she did not do it during the identification parade, nor did she give the description to the police. This is what she told the court:-

“The man removing the TV was short and brown. Accused 1 is the one who removed the TV. Accused 1 had an elongated face. There was light from the electric bulb at the sitting room and I positively identified accused 3...”

The 1st appellant was not found with stolen property and what is lingering in our minds is whether the

above evidence was safe to sustain a conviction or the trial court was bound to engage in another line of enquiry as stated in the case of R -vs- Turnbull and Others, (1976) 3 All ER 549, Lord Widgery C.J. had this to say:-

“First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?”...

We are aware that under **Section 143** of the **Evidence Act**, an accused person can be convicted on the basis of uncorroborated evidence. But the uncorroborated evidence must be obtained in circumstances that do not create doubts as to the identity of the suspect. The 1st appellant was a stranger to PW1, the attack took place at 8pm, although there was electricity lights, the witnesses said they were ordered to lie down and PW1 saw the 1st appellant when he was loading the TV in the car. No description was given to the police; there is no evidence at all regarding how the 1st appellant was arrested in connection with the robbery, not to mention that the arrest was effected several months later. In Maitanyi -vs- Republic, (1986) KLR 198, the Court of Appeal at page 201 held:

“The strange fact is that many witnesses do not properly identify another person even in daylight... It is at least essential to ascertain the nature of light available. What sort of light, its size and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care? It is not a careful test if none of these matters are unknown because they were not inquired into.... See Wanjohi & Others -vs- Republic (1989) KLR 415”.

As we conclude on the 1st appellant’s appeal, we need to state that we find the evidence of identification problematic for reasons that first; it was not clear how the 1st appellant was arrested several months later. The evidence by the police is silent on this, the identification was done several months later and it was only PW1 who identified the 1st appellant. We note there was a possibility that memories fade with time. Also the identification was not supported by a description of the 1st appellant which should have been given to the police prior to the arrest. These issues coupled with the erroneous conclusion drawn by the learned Judges that the victims of the robbery were with the assailants between 8 pm to midnight; we cannot rule out the possibility that there was some weight attached to this erroneous evidence that may have affected their conclusion that the identification was safe to sustain. For the aforesaid reasons we find the appeal by the 1st respondent has merit.

On the 2nd appellants appeal, his conviction was principally based on the evidence of possession of a T.V set and a flowered bedcover which were stolen from the complainants, they were recovered from the house of the 2nd appellant. The 2nd appellant claimed the T.V was his and he produced a receipt. On the other hand the complainants claimed the T.V was theirs, what was not resolved by the two courts below in this evidence is that PW1 stated his T.V was 24 inch but the subject T.V was 21 inch. This contradiction coupled with the fact that the 2nd appellant claimed ownership of the same T.V and produced a receipt for the same, lends credence to the submission by counsel for the 2nd appellant that a conviction based on this evidence is not safe to sustain. How about the flowered bedcover? The 2nd appellant was arrested by PW8, Joseph Koech and this is what he told the trial court;

“We arrested accused 3 inside his house at Kangarithi in Nyeri. We recovered the TV – Exh. 3 herein. We recovered the TV and one bedcover. ..”.

This is what he said during cross examination;-

“You had no receipt for one TV recovered from your house. The complainant identified the one TV as his. The recovered items were included in the inventory. The inventory does not mention the bedcover. OB 19/706 does not indicate the bedcover...”.

This recovery was made almost five months after the robbery. There were very many people who were arrested and the inventory this witness is referring to was not specific on which bed cover was recovered where. No receipts were produced or evidence of unique features was adduced by the complainants to positively identify this bedcover. In the circumstances, we agree that had the learned Judges subjected this evidence to fresh analysis, they would have come to the same conclusion as we have, that the conviction of the 2nd appellant was not safe to sustain.

For the aforesaid reasons, we find merit in this appeal, we quash the conviction recorded against the 1st and 2nd appellants and set aside the death sentence. The appellants are to be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 3rd day of February, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR